

Must Drinkers Be Warned of Risks?

Alcohol Marketing Under Attack

BY ANDREW BLUM
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SEVERAL LAWSUITS around the country are mounting new challenges to the alcoholic beverage industry's marketing tactics, and contend it has to warn consumers about the possible dangers of drinking.

Beer and liquor manufacturers have faced sporadic product liability suits in the past, but have thus far escaped liability because courts, in dismissing charges against them, have said the harm from alcohol is so obvious there is no need to warn.

"If the risks are as obvious as warts on a debutante's nose, many defendants say there is no duty," said Thomas F. Lambert Jr., a professor at Suffolk University Law School in Boston. Professor Lambert said the area has been "well-thrashed" but now plaintiffs' attorneys are

using more "subtleties and sophistication."

One arguably sophisticated case was brought by the family of a Pennsylvania man whose "moderate" beer drinking allegedly damaged his pancreas and killed him. The case was dismissed in federal district court but the 3d U.S. Circuit Court of Appeals overruled the lower court late last year, saying a jury should have the right to consider the issue of liability for failure to warn about risks of moderate drinking. *Hon v. Stroh Brewery Co.*, 835 F.2nd 510.

The plaintiffs' attorney, Maurice A. Cardone of Wilkes-Barre, Pa.'s Touey & Namey, noted that the 26-year-old plaintiff drank three to four Old Milwaukee beers three to four nights a week for 5½ years — a total of 3,000 beers. Mr. Cardone said that may seem like a lot of drinking at first blush, but he added it was "not more than [that consumed] by the average person."

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Attorneys for Stroh, in the brewery's motion for summary judgment, told the lower court that it cannot be held liable because its beer — Old Milwaukee — was not defective and it was under no duty to warn of the obvious dangers connected with alcohol.

Product liability attorney Victor E. Schwartz of Washington, D.C.'s Crowell & Moring said the case presented an unusual question because the plaintiff's condition occurs in perhaps one in 100,000 people.

Asserting that liquor has certain inherent, immutable characteristics — just as "knives cut and gas burns" — Mr. Schwartz said the jury would have to jump several hurdles to find against Stroh. Even if the plaintiffs could prove there is a duty to warn, the jurors would still have to consider whether the man would have consumed the beer regardless of any warning.

Sheila L. Birnbaum of New York's Skadden, Arps, Slate, Meagher & Flom, Anheuser-Busch Inc.'s national product liability counsel, said the company's defense has been to say that the

Defendants say risks of drinking are 'as obvious as warts on a debutante's nose,' according to one law professor. But, he adds, plaintiffs' attorneys are now using more 'subtleties and sophistication.'

alcoholic beverage manufacturers, she added, all have been unsuccessful.

"They have argued — in many jurisdictions — alcoholism, addiction and hyping by ads," Ms. Birnbaum said. "And in all of the cases the courts have uniformly dismissed these cases. She noted that *Hon* is the only product liability case not to have been dismissed so far.

Fetal Alcohol Syndrome

Another lawsuit focusing on duty-to-warn centers on fetal alcohol syndrome, or drinking during pregnancy, which can lead to birth defects. The first of several such cases goes to trial next April in federal court in Seattle.

The suit, filed by Barry M. Epstein of Newark, N.J.'s Sills Cummis Zuckerman Radin Tischman Epstein & Gross, claims "Jim Beam" knew of the dangers of drinking during pregnancy. The suit adds that the company, prior to 1984, did not have a warning on its product concerning birth defects.

Jim Beam, through its attorney, New York's Chadbourne & Parke, denied the allegations and said although the liquor in question — bourbon — does not carry a warning, neither state nor federal law requires it.

Anheuser-Busch is also a defendant in one of the upcoming fetal alcohol syndrome suits, and Ms. Birnbaum

noted that certain state and municipal laws require establishments serving liquor to place signs warning of the dangers of drinking during pregnancy. For example, the city of Seattle has mounted a public education campaign about the issue.

Another suit involving Anheuser-Busch focuses on the marketing of alcoholic beverages. The suit, in Kentucky, grew out of a serious automobile accident involving an intoxicated driver under the legal drinking age. *Smotherman v. Anheuser-Busch Inc.*, 85-CI-151 (Cir. Ct., Logan Cty.).

David A. Lanphear of Bowling Green, Ky.'s Safford, Satterfield & Lanphear said the case, currently on appeal to the Kentucky Court of Appeals, centers on alleged targeting of the product to underage drinkers.

"They are luring an illegal market to acquire and consume this product," said Mr. Lanphear, claiming that the brewery aims its advertising at 18 to 24 year olds. In Kentucky, the legal drinking age is 21.

Ms. Birnbaum said Anheuser-Busch's argument in that case mirrors that in the others: "It's common knowl-